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# Commentary on Yanal

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**In Response to:** Robert J. Yanal's *Incorrect judicial decisions*


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Supreme Court Justice Robert Jackson said it very simply: "We are not final because we are infallible; but we are infallible only because we are final." Prof. Yanal's paper says it at somewhat greater length, raising provocative questions about this unsettling structure of authority in our legal system. Contrary to everything we know about human nature, and notwithstanding two centuries of judicial atrocities, there is a sense in which the nine Justices of the United States Supreme Court can never be wrong. This paradox flies in the face of unrelenting press and popular criticism of actual Supreme Court decisions, culminating in the notorious *Bush v. Gore* decision of last December. At my university, our best undergraduates start losing sleep when they first catch a whiff of the problem Prof. Yanal lays before us. Even worse than this creepy infallibility is the thought that the same judges who were infallible in case A can turn around and get the law wrong in case B, not because of any loss of legal wisdom, but simply because one of their four compatriots from Case A votes with the other side in Case B. There is something deeply wrong with this picture.

Prof. Yanal's paper doesn't attempt to say what is wrong with it. He acknowledges all the appropriate discomfort with the problem, but his task is more analytical. His paper makes the following hypothetical point: to the extent that one accepts the infallibility perspective, one must abandon many other perspectives—including some very attractive ones. Above all, one must abandon the critique of cases like *Bowers v. Hardwick*, which belongs in the select company of *Roe v. Wade*, *Brown v. Board of Education*, and *Lochner v. New York* as paradigmatic failures in the eyes of vocal critics. Of course, there are some legal philosophies that make this infallibility principle more than just hypothetical. Legal positivism and legal realism seem to embrace it, but then must deal with the resulting dissonance it creates for people of common sense.

The consequences of *not* granting infallibility may be worse than we think. If a majority of the Supreme Court can be second-guessed on a matter of constitutional law, we have to look beyond the passive voice to inquire exactly who will be doing the second-guessing. If *someone* else can correct them on matters of law, then *everyone* else can do so, and legal authority is eventually subdivided among competing interest groups. Ronald Dworkin began taking rights seriously back in the days when critics were bashing the Warren Court, using the subtle argument that judges were not necessarily fallible, just because their critics said they made mistakes.

Legal philosophers have explored every conceivable aspect of this important dilemma built into living legal systems. Quite simply, the standards of legitimacy are different from the standards of finality, a difference that is guaranteed to show up at the top of the legal hierarchy. This is true whether it is a Supreme Court or Parliament that has the final say. Philosophers have grabbed onto either horn of this dilemma and learned to live with the consequences: those who seize legitimacy move toward natural law theories; those who seize finality become positivists.

I am going to leave this philosophical debate in the capable hands of Prof. Yanal and address some consequences for rhetoric. The 1986 case of *Bowers v. Hardwick* provides an excellent example of courts under pressure to reconcile their two distinct functions: to have the last word, and to make it convincing. In my view, both the majority and the dissent in this case display

precisely the same rhetorical strengths and weaknesses. They both fall short of squaring the judicial circle, not because of incompetence or moral slacking, but because judicial arguments always fall short of achieving deductive certainty. There are very few constitutional cases where the rhetorical consequences are as obvious and unsettling as in *Bowers.*

The most striking fact about this case, from a technical point of view, is the shortage of precedents available to both sides. There were only three or four prior cases for guidance, perhaps as many as six if you stretch it. The prior cases, in turn, were based on scant authority, and were highly controversial in their own right. This contrasts with judicial lawmaking in standard common law situations, where there are potentially hundreds of prior cases from which to draw analogies and principles. If there is a problem here, it is that American society has demanded that its judicial system provide answers for contentious cultural issues—not just any old answers, but definitive, absolute, and final answers, even when cultural battles are still raging. We turn to the courts for closure on questions involving sexuality and reproductive choices, but of course we want closure on our terms, not those of our most vocal opponents.

The *Bowers* case asked the Supreme Court to call the question on homosexuality. Everything about this case is unusual and intriguing, including the Dickensian name of the plaintiff, Michael Hardwick, who filed a preemptive lawsuit against the state of Georgia, to prevent them from prosecuting him for sodomy. The prosecution had already decided not to file charges against him, but Hardwick imagined that the shocking and intrusive police action that caught him in the act of oral sex would gain the sympathy of the courts, which he hoped would send a symbolic message to the homophobes. The unique power of the courts to combine legitimacy and finality make them an attractive medium for sending messages to one's enemies. But first you have to win your case.

Was Hardwick's behavior protected under the Constitution? The judges had only a handful of precedents to consult, including a case that concerned married couples using contraceptives, and the abortion case. There was another case about police invading a private home and seizing pornographic films, and other such singular matters. In pondering these cases, everything depends on the level of generality at which one reads them. If the contraception case was just a contraception case, then it is hard to see that it has much to do with homosexual behavior. If, on the other hand, one reads that earlier case as a strong cultural message that people should be free to do whatever they want, then it means that homosexuals should be free to do whatever they want.

Here is the crux of the case, from a rhetorical aspect. If you take these few precedents and interpret each one at the lowest possible level of specificity, they simply do not add up to victory for Michael Hardwick. If instead you interpret each prior case at its highest level of rhetorical flight, then Hardwick is well within the zone of protection. Each of the precedents was highly problematic in itself. In the abortion case, *Roe v. Wade*, the Court was not clear whether its decision was about freedom in general, or merely about a specific right for women and/or their physicians to choose abortion during the first two trimesters of pregnancy. The ambiguity was carefully calculated. Courts are accustomed to manipulating the level of generality in their interpretation of past cases, but normally they have so many precedents to interpret that they can bury their inventive craft in a string of citations.

The legitimacy of legal method depends on taking past cases as we find them, and not manipulating the cases retrospectively to create the precedents we want. If we are going to grant

finality to some public body, we want that body to display rhetorical restraint, not openly invent premises to match some preconceived conclusion. The majority and dissenting opinions in *Bowers* read exactly like legal briefs in an adversarial battle. The majority parrots the narrow readings of precedent advocated by the state of Georgia; while the dissent adopts Hardwick's very broad interpretations. As Ronald Dworkin might say, you and I are not in a position to prove that either group of judges was necessarily wrong. But, more important, neither side can persuade the other that its interpretation is fair, balanced, and legitimate—and deserving of finality.

I end up at the same place with Prof. Yanal. The Supreme Court has the final say on interpretations of law, but their authority makes us uneasy and distrustful. When the rhetorical ropes and pulleys reveal too much of the backstage manipulation, we begin to ask ourselves if judicial supremacy is such a great idea. Many of us asked ourselves that question last December, when the Court intervened in the presidential election. Our alternative, of course, is something like legislative supremacy, but we will leave that topic for another day.